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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAMES EDWARD HARDING,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES EDWARD HARDING
10537-001
P.O. Box 725
Edgefield, SC 29824
Petitioner, *pro se*

68 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals overlooked the constitutional claim as required by statute in denying the petitioner's request for the Certificate of Appealability.

2. Whether the record is adequately developed to demonstrate that the petitioner was deprived of his Sixth Amendment right to assistance of counsel when his trial counsel failed to inform him that he had a right to decide whether to testify on his theory of defense.

PARTIES TO THE PROCEEDING

1. James Edward Harding was the defendant in the United States District Court of the Northern District of Alabama, appellant in the United States Court of Appeals of the Eleventh Circuit and petitioner for Writ of Certiorari in this Court.

2. United States of America was the respondent in the United States District Court for the Northern District of Alabama, Appellee in the United States Court of Appeals for the Eleventh Circuit and is respondent in this Court.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

JAMES EDWARD HARDING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petition for the Writ of Certiorari To The United Stated Court of Appeals For The Eleventh Circuit

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Petitioner, James Edward Harding, Petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The order of the United States Court of Appeals for the Eleventh Circuit is unpublished, reprinted in the Petitioner's Appendix.(Pet. App. A3) Pertinent District Court opinions are also reprinted. (Pet. App. A4) The Petitioner's indictment is premised upon violations of 18 U.S.C. § 1792 (a)(2), and 21 U.S.C. §§ 841, 846.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit denied the Petitioner's Request for Certificate of Appealability on July 11 , 2002. (Pet. App. A3) This Court's jurisdiction is respectfully invoked under 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES AND RULE

28 U.S.C. § 2253(c)(2)(3), reads in pertinent part:

> "[U]nless a circuit justice or judge issues a Certificate of Appealability, an appeal may not be taken to the court of appeals... A Certificate of Appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right... The Certificate of Appealability under paragraph (1) shall indicate which specific issue or issues

satisfies the showing required paragraph (2).

28 U.S.C. § 2255, reads in pertinent part, as follows:

> "[A] prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."
>
> "[U]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to

collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

28 U.S.C. § 1651 Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has Jurisdiction.

United States Constitution, Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

The petitioner is serving a 100 month term of imprisonment upon his indictment and conviction in the Northern District of Alabama. (Pet. App. A22) James Edward Harding and his brother, Gregory Harding, were arrested on a federal complaint and charged, *inter alia*, with Possession of a Prohibited Object which contained Marijuana in a Federal prison and Possession with Intent to Distribute Marijuana and Conspiracy, in violation of the 18 U.S.C. § 1792(a)(2) and 21 U.S.C. §§ 841, 846.

Mr. Harding's conviction and sentence was premised upon the failure of his trial counsel to allow him in the decision making process, in order, that Mr. Harding testify in his behalf and put on the applicable defense that the marijuana retrieved by the prison officials was for personal usage where there was no evidence to establish remuneration or an intent to distribute the marijuana to support the conviction.

Prior to trial, on May 6, 1999, Mr. Harding explained his version of the events to his attorney by letter that he sought to take the stand and testify and that the pre-trial motions should be filed.[1] (Pet. App. A23)

On the day of trial while in conference with both attorneys, Mr. Bremer and Mr. Roberts, James and Gregory Harding learned that the government sought to produce Darrell Steward, a federal inmate, to assist with the prosecution's case, and the decision as to whether both Messrs. Harding would plea or stand trail was discussed.

Mr. Bremer advised Gregory Harding that Mr. Steward's testimony could not establish that he had obtained proceeds or that he knew whether the substance was for remuneration. James Harding then stated to his

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1. Mr. Harding was represented by Tracey L. Roberts through his pre-trial and trial proceedings, made an early attempt to request putting on his defense that the marijuana confiscated by prison authorities was for his personal usage.

attorney, Mr. Roberts, that Mr. Steward had a motive to testify and that his testimony would be biased where Mr. Harding informed attorney Mr. Roberts that bad blood had developed between Mr. Harding and Mr. Steward where Mr. Steward accused Mr. Harding of having knowledge that his wife was coming into the prison to visit another inmate, and that Mr Harding did not advise Mr. Steward of his wife's extramarital activities.[2]

Moreover, although his brother's attorney made the proper inquiry before the Court and indicated to the Court that Gregory Harding made a conscientious decision not to testify during the trial, attorney Bremer administered the colloquy before the Court, making the decision by Gregory Harding part of the record. (Trial Transcripts 6/15/99. pp. 292, 293-294).

James Harding then informed attorney Roberts that he would provide his testimony to dispute Mr. Steward's information, however, his attorney made a strong recommendation to the contrary by stating that Mr. Harding would be prejudiced if the jury were made aware of his prior prison infractions received for prior marijuana usage and his criminal history; a decision which Mr. Harding "acquiesced."

After Mr. Steward's testimony, Mr. Harding again suggested to his attorney to take the stand, where his

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2. During cross-examination of Mr. Steward, Mr. Harding's attorney sought to present Mr. Steward's motivation was excelled with vindictiveness toward his client.

attorney explained to him that it would not be necessary because the government has failed to meet its burden of proof and that the count would be dropped. Mr. Harding felt his explanation was essential to the Jury's findings in order to understand the marijuana that was confiscated by prison authorities was for his own personal usage. However, since he believed that his attorney had the authority to decide whether or not he would testify, he yielded to his advice, despite his reservations about his attorney's optimistic outlook.

Although the testimonies of Mr. Steward and Lieutenant Ruley were consistent in all respects to the government's case that the marijuana would be for remuneration, attorney Roberts never explicitly advised Mr. Harding that it was ultimately his right to decide whether or not to testify in his own defense. After the government put Mr. Steward on the stand, attorney Roberts moved for a direct verdict of acquittal, which the trial court denied. (Trial Transcripts 6/14/99, pp. 294, 295).

Mr. Harding filed his Certificate of Appealability by placing his request based upon being deprived of assistance of counsel during the "critical stages," of his trial. U.S. Ct. of App. 11th Cir Rules Section 22(a), 28 U.S.C.A., to which this matter is now before this Court.

The questions this Court must decide is whether Mr. Harding raised a substantial showing of a denial of the guarantees of his Fifth and Sixth Amendment rights as the premised Certificate of Appealability was designed

and whether his attorney failing to allow him to testify demonstrates the violation of its own ruling under *Teague* may allow this Court's supervisory power to exercise whether certiorari should be granted.

I. RELEVANT FACTS JUSTIFYING THE CONSTITUTIONAL CLAIM FOR CERTIFICATE OF APPEALABILITY

On June 10, 2002, James Edward Harding filed for a request to file Certificate of Appealability to the Eleventh Circuit Court of Appeals contending that he was deprived of assistance of counsel when his trial counsel failed to inform him that he had a right to decide whether to testify on his behalf, in order, to present his theory of defense, and that, because of his trial counsel's omission he was prejudiced was the constitutional claim. *Rock v. Arkansas*, 483 U.S. 44, 97L. Ed. 2d 37, 107 S. Ct 2704 (1987); *Murray v. United States*, 145 F. 3d 1249 (11th Cir. 1998).

Mr. Harding sought Certificate of Appealability under the Eleventh Circuit controlling precedent in *United States v. Teague*, 953 F. 2d 1525 (11th Cir. 1998) (*en banc*). In *Teague*, the court there exhaustively reviewed the development of the right to testify and reaffirmed that it is a recognized fundamental constitutional right, personal to the defendant, and *one that cannot be waived by the trial court or defense counsel. id.* at 1543.

Moreover, his understanding was based upon the facts and records of his criminal trial that clearly demonstrate the substantial showing of a denial of a constitutional right as required by statute. *Slack v. McDaniel*, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S.Ct. 1565 (2000); *Barefoot v. Estelle* 463 U.S. 880, n.4 & 8a, 8b, 463 U.S. at 892, 77 L. Ed. 2d 1090, 104 S.Ct 209 (1983). Reviewing the "substantial showing", requirement in *Slack v. McDaniel*, the Supreme Court explained that although the requirements were codified in 28 U.S.C. §2253, the standard in *Barefoot* was still pertinent to the analysis. Under *Murray v. United States*, the Eleventh Circuit granted the constitutional claim for the specific issue which was part of his request for a Certificate of Appealability. *id.* at 1252. The Eleventh Circuit rejection of his single issue as in *Teague* so far departed from the usual course of judicial proceeding tailored a way to depart in this case. This reason itself should mandate exercise of this Court's Supervisory Power to issue Certiorari.

II. REASONS FOR GRANTING THE WRIT

The order of the United States Court of Appeals denial of the Certificate of Appealability is in conflict with decisions of other court of appeals on the constitutional claim. Moreover, the order has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's Supervisory Power.

Mr. Harding's indictment and conviction on this drug possession charge was based solely on the testimonies of Lieutenant Brian Ruley of the Federal Bureau of Prisons and inmate Darrell Steward. Lieutenant Ruley speculated that the 26.61 grams of marijuana was worth a lot of money in prison and that he "guessed" the contraband could make several marijuana cigarettes. (Trial Transcripts, 6/15/99, pp. 280-283). Steward, a federal prisoner called by the government, testified that he was testifying for preferential treatment and leniency in sentencing for his testimony against Mr. Harding and he stated that Mr. Harding sold the marijuana on prison grounds. (Trial Transcripts 6/15/99, pp. 258-261). Harding sought to testify on his own behalf to demonstrate that the contraband seized was for his personal usage and personal consumption; yet the matter was never brought to the attention of the trial court by his trial counsel.

This Court has recognized "a court's incorrect legal determination has never been allowed to stand because it was reasonable." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L. Ed. 2d 389 (2000) (O'Conner, J., concurring). *also see; Wright v. West*, 505 U.S. 277, 305, 112 S.Ct. 2482, 120 L. Ed. 2d 225 (1992).

Under these facts, the conclusion of the court of appeals that (1) Mr. Harding failed to demonstrate a substantial showing of a constitutional claim under *Rock* and the Eleventh Circuit's own controlling precedent in *Teague* conflicts with the law of other circuits and the decision to deny his request for the Certificate of

Appealability departs from the accepted and usual course of judicial proceedings so as to call for the exercise of the Court's supervisory power.

III In light of *Rock v. Arkansas*, 483 U.S. 44, 49-53, 107 S.Ct. 2704, 2707-09, 97 L. Ed. 2d 37 (1987), and *Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L. Ed. 2d 358 (1972), and the other leading Court of Appeals decisions holding that the failure of counsel to follow the *Rock/Brooks* and its progeny deprives a criminal defendant his Fifth Amendment right to counsel under the United States constitution renders a decision that conflicts with this Court and other circuit's and departs from the accepted course of judicial proceedings so as to call for the exercise of this Court's supervisory power.

A. The Court of Appeals has departed from its own controlling precedent and from the Accepted and Usual Course of Judicial Proceeding so as to call for the exercise of this Court's Power of Supervision.

Harding respectfully invites this Honorable Court to summarily reverse the court of appeals order. The Court's Rule 10 provides:

Consideration Governing Review on Certiorari. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the court should consider.

(a) A United States Court of Appeals...has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Courts Supervisory Power.[3]

As further argued here, the conclusion of the court of appeals that, Mr Harding failed to demonstrate a substantial showing of denial of constitutional claim seriously departs from the accepted and usual course of judicial proceedings so as to require immediate review.

In the historical context of *Rock/Brooks* and its progeny as well as the Eleventh Circuit's precedent in *Teague* and the overriding importance of the right to assistance of counsel by the Sixth Amendment for this Honorable Court to intercede. Mr. Harding, simply states, the rule articulated in *Rock/Brooks* and its own precedent in *Teague*, however, was not implemented to his request for Certificate of Appealability by the court of appeals in this case. In *Rock*, this Court held that a criminal defendant has a constitutional right to testify in his own behalf is rooted in the Fifth and Sixth Amendments of the United States Constitution. *Rock*, at 2709. In *Brooks* v. *Tennessee*, Justice Brennan delivered a 1972 opinion that determined that whether the defendant

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3. *See: New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (court reverses Second Circuit's decision that Equal Protection Clause of the Fourteenth Amendment is violated by the Transit Authority's refusal to employ persons who use methadone.

is to testify...a matter of constitutional right. *Brooks,* at 364. The *Rock* majority emphasized that the right to testify "is one of the rights that 'are essential to due process of law in a fair adversarial process'". *Rock,* at 2709.

Notwithstanding, this Court has acknowledged that on numerous occasions has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is fundamental constitutional right. *Rock,* at 2710 n.10.

Mr. Harding contends that the decision of the court of appeals begs the question. Why did the court of appeals reject this Court's guidance, and in doing so, it's own controlling precedent under *Teague*? Justice Kennedy specifically notes that in order to obtain a Certificate of Appealability under section 2255, a habeas applicant must make a strong showing of a denial of constitutional right, a demonstration that under *Barefoot v. Estelle,* 463 U.S. 880, 77 L. Ed. 2d 1090, 104 S.Ct. 209 (1983) White, J), includes showing that a reasonable jurist could debate whether or, for that matter, agree that the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Slack,* 120 S.Ct. At 1693-4.

Moreover, prior to *Slack,* Justice White delivered the opinion with a detailed analysis under the standards in *Barefoot v. Estelle,* which required that a request for Certificate of Appealability demonstrate a substantial

showing of denial of a federal constitutional right. *Barefoot*, 463 U.S. 893.

The importance in accepting certiorari in this case will reflect the importance that this Court places upon the due process clause of the fifth amendment and Mr. Harding's guarantees under the sixth amendment protected by the United States Constitution together with the doctrines observed by the *Rock/Brooks* Court, in the context of the criminal defense. This is why the court of appeals decision is so extraordinary and falls within the very exceptional jurisdiction of this Court to intercede.

Both this Court and the Eleventh Circuit Court of Appeals has found that a criminal defendant has a right to decide whether he wishes to testify in order to present the theory of his defense. However, this constitutional claim was outlined in his application in the Eleventh Circuit for the request for the Certificate of Appealability which was parallel to the holdings in *United States v. Teague*, 953 F. 2d 1525 (11th Cir. 1992) (superceded its ruling of 908 F. 2d 752 (11th Cir. 1990) (*en banc*)). This point demonstrated alone should provide this Court to determine certiorari.

A. Whether the record is adequately developed to determine that Mr. Harding's counsel deprived him of assistance of counsel when he failed to allow Harding to make the proper decision whether to testify on his theory of his defense.

A brief recitation of the trial record highlights the factual basis for the issue upon which certiorari is sought.

With regard to Mr. Harding's constitutional claim raised in his request for Certificate of Appealability under *Rock/Brooks* and its progeny, his trial counsel's failure to assist him in the decision making processes and to inform him that he had the right to make the decision to testify or not testify. The trial court sought the proposed standard instruction as the following exchange demonstrates:

THE COURT:	I have, obviously, a standard instruction that I have previously stated. It would be in essence, that a defendant has the right not to testify, may or may not. And he does not, then it cannot be held against him. Do you have any problem with that.
Mr. Salter:	No problem with that.
THE COURT:	The government has no problem. Do you have any problem with that Mr. Bremer
Mr. Bremer:	No.
THE COURT:	Mr. Roberts
Mr. Roberts:	No, Your Honor.

THE COURT: Now I think what I understand Mr. Bremer to be saying, though, that he wants to have a colloquy on the record outside the presence of the jury, with all parties present, though, with his client, to some extent, at least to the point that he informed his client of his constitutional rights with regard to self-incrimination and the right to testify or not to. I think that's what - - is that what you're saying

(Trial Transcripts, 6/15/99, pg. 292)

* * * * * *

THE COURT: All right. Mr. Roberts, do you have anything for the Court to consider at this time

Mr. Roberts: Yes, Your Honor. We would like to, on the behalf of James Edward Harding, make a motion for direct verdict of acquittal as to count four against James Edward Harding. The government has failed to prove all of the elements involved in that count knowingly and intentionally possessing marijuana with the intent to distribute.

Your Honor, there was no testimony as to intent to distribute. There was testimony from the inmate as to conduct two weeks prior. But nothing that was specifically connected to this particular marijuana. There's nothing that connected the intent to distribute to this particular marijuana. What the inmates's testimony was that two weeks prior he had sold some marijuana. But nothing that would connect the intent to distribute to the marijuana that was in possession on March 28 ,1998.

As far as knowingly and intentionally possessing marijuana, there was no testimony that Mr. James Edward Harding had any knowledge what was in the package that was delivered to him, or that was allegedly delivered to him, by Gregory Harding.

In fact, two correctional officers said that they didn't know what was in the package when they saw the package. Based on that, Your Honor, we would ask for direct verdict of acquittal as to Count Four for failure to prove the elements.

THE COURT: Mr. Salter?

Mr. Salter: Yes, sir. Your Honor, our response would simply be similar to Mr. Bremer's argument. That is, that we have had testimony from the inmate that, I think Mr. Roberts mentioned two weeks or several weeks, but I think his testimony was one week prior to the arrest, that the defendant made statements to the effect that he was in possession of and/or had something to do with the introduction of drugs into the prison system.

We've got his testimony to a Ms. French, telling her what the defendant was doing, what the defendant James Harding was doing. And that being dealing with drugs in the prison. We've got the amount of drugs involved, several cigarettes, that would be made by the Government's Exhibit Number 4, from the correctional officer. And we think that based on that, we've made a prima facie case.

(Trial Transcripts, 6/14/99. Pp. 294-295)

THE COURT: All right. Your motion as to each count is denied.

Mr. Roberts: Yes, Your Honor.

(Trial Transcripts 6/14/99, pg. 296)

Moreover, in protecting Harding's fundamental right, the existence of an on-the-record waiver would have added benefit of foreclosing his request for Certificate of Appealability. Under this theory, the right to testify, merely a subordinate reciprocal right to remain silent, does not attach until he affirmatively asserted it in court.

This model by denying his request for the Certificate of Appealability on this ground despite the Eleventh Circuit's holding in *Teague* clearly demonstrates that a defendant who is unaware that he has the right to assert his desire to testify over his attorney's wishes cannot be deemed to have waived his right knowingly and voluntarily.

Such advice would have been crucial because the trial court would have made a determination whether Mr. Harding made an effective waiver of a fundamental constitutional right. Here, his counsel failed to inform the court to the contrary.

The Eleventh Circuit panel, in denying Harding's Certificate of Appealability on his constitutional claim, has taken a serious departure from the accepted and usual course of the other circuits where there is consensus that Harding's trial attorney failed to allow him in the decision making processes which Harding sought to testify in his own behalf to his theory of defense that the marijuana

confiscated by prison authorities was for his own personal usage which prior infractions documented through the federal Bureau of Prisons would have tended to support his defense, even if the government would have decided to cross-examine him with documentation for the truthfulness for impeachment. The facts are, the defense would have been consistent to his prior infraction for marijuana usage while in prison. Not with the intention to distribute the marijuana, which the government placed before the jury.

Mr. Harding's constitutional claim hinged on the fact that the failure of his trial counsel to include him in the decision of whether his testimony would have been decided by the jury was the constitutional claim Certificate of Appealability was sought.

The underlying court order denying his request appears to repudiate that concept. Therefore, Mr. Harding respectfully invites this Honorable Court to accept certiorari in this matter also. It appears that the lower court of appeals' decision repudiates its earlier 1992 decision in *Teague* notwithstanding governing law to the contrary to its denial of contending that Mr. Harding has not made a substantial showing of a constitutional claim, which clearly makes this case ripe for review by this Court. *Horn v. United States*, 524 U.S. 236, 141 L. Ed. 2d 242, 118 S.Ct. 1969 (1998) (Kennedy, J) (Supreme Court held to have jurisdiction to review Federal Court of Appeals' denial of Certificate of Appealability concerning Federal District Court's denial of accused's motion under 28 U.S.C. section 2255 to vacate federal conviction).

Harding states the Eleventh Circuit's reversal of a district court's conclusion on an *en banc,* panel decided that a defendant has a constitutional right to testify in his own defense. *Teague, id.* at 1534. In *Teague,* the Eleventh Circuit Court of Appeals exhaustively reviewed the development of the right to testify and reaffirmed that it is a recognized fundamental constitutional right, personal to the defendant, and *one that cannot be waived by the trial court or defense counsel.*

The Eleventh Circuit in *Teague* relied on *Rock''s* holding that the right to testify is "a necessary corollary to the Fifth Amendment guarantee against compelled testimony, "and added that "under the Supreme Court's reasoning in *Rock,* the right to testify essentially guarantees the right to ultimately choose whether or not to testify." *id.* at 1525 (quoting; *Rock v. Arkansas,* 483 U.S. at 52, 107 S.Ct. At 2709.

There is no appropriate distinction between the Eleventh Circuit's decision in *Teague* or the Supreme Court's conclusion in *Rock* or *Brooks,* while they work together, hand in hand, under a substantial showing of a constitutional claim. Likewise, the failure of the Court of Appeals to accept the fact that Mr. Harding made a substantial showing to a constitutional claim goes far against the grain of its established precedent. This Court is respectfully requested to allow certiorari under as applying a jurisdictional claim. *Horn,* 524 U.S. at 211.

IV. CONFLICT IN CIRCUITS

Other circuits, despite the order Mr. Harding received from the Court of Appeals, clearly follow this dictate, that the remaining Federal Circuit Court of Appeals accepted the due process point that a defendant has the right to make a decision to testify to his theory of defense and the failure of his trial counsel to explain to his client, or bring the matter before the trial court, in order, that Mr. Harding would make the appropriate decision goes against the dictates as interpreted in *Rock* or *Brooks*. *See; Foster v. Delo*, 11 F. 3d 1451 (8th Cir. 1994) (defendant's right to testify and put on one's defense including his right to testify in one's own behalf, is fundamental constitutional guarantee that can only be waived by the defendant himself). *United States v. McMeans*, 927 F. 2d 162, 163 (4th Cir. 1991) (same as indicated for a constitutional claim under the right to testify is only decided by the defendant). *Rogers-Bey v. Lane*, 896 F. 2d 279, 283 (7th Cir), *cert. denied*, 498 U.S. 838, 111 S.Ct. 93, 112 L. Ed. 2d 65 (1990) (right to testify truthfully on one's own behalf is a fundamental right grounded in due process clause of the Fifth Amendment and compulsory process clause of the Sixth Amendment; this right may not be waived by counsel, but is personal to defendant, and he alone may decide whether the right will be exercised). *United States v. Martinez*, 883 F. 2d 750, 754-55 (9th Cir. 1989); *vacated on other grounds*, 928 F. 2d 1470 (9th Cir), *cert. denied*, 501 U.S. 1249, 111 S.Ct. 2886, 115 L. Ed. 2d 1052 (1992) (defendant's right to testify is constitutional right of fundamental dimensions). *Lema v. United States*, 987 F. 2d 48, 53 n.4 (1st Cir. 1993) (assuming, without deciding, that the right to testify is fundamental and may not be waived by counsel). *also see; Jordan v. Hargett*, 34 F. 3d 310

(5th Cir. 1994) (defendant's failure to make record of his desire to testify did not create irrebuttable presumption of waiver). *United States v. Penncook*, 65 F. 3d 9 (3rd Cir. 1995) (defendant's waiver of the right to testify must be knowingly and intelligent).

V. THE ERROR WAS NOT HARMLESS BUT WAS PREJUDICIAL TO MR. HARDING.

In this particular case, James Edward Harding was caught red-handed with possession of marijuana in a federal prison and he sought to testify that the contraband (marijuana) was for his personal usage, his attorney, on the other hand, assumed under cross-examination his prior convictions would prejudice and taint the trial. Mr. Harding insisted that the truthfulness of his testimony would exculpate the prosecution's contention for the charge of an intent to distribute the marijuana. Mr. Harding insisted that his testimony would have militated toward mitigation exculpating him from liability under the government's pretense that Mr. Harding intended to distribute the marijuana. Harding's arsenal also included the government's evidence, in the event, he would have taken the oath would have demonstrated that Mr. Harding during numerous occasions obtained disciplinary infractions from prison for usage of marijuana all to avail because of the omission of his trial counsel.

Because the error in this case is of constitutional dimension, the stringent harmless error standard

designed in *Chapman v. California,* 386 U.S. 18 (1967) is applicable.

Pursuant to this standard trial counsel's failure to allow Mr. Harding to make an informed choice and decision to present his defense through the usage of his testimony contributed to the conviction sustained. The testimonies of Lieutenant Ruley and Darrell Steward constituted the government's most powerful evidence to support the verdict, as such, the error of such deprivation contributed to the 100 month sentence he received.

Several years ago, this Court concluded in *Hohn v. United States,* 524 U.S. 236, 141 L. Ed. 2d 242, 118 S.Ct. 1969 (1998), that, it was appropriate for this Court to personally have the vested jurisdiction to review a lower court of appeals denial of Certificate of Appealability concerning a denial of a section 2255 to vacate a federal convection.

The Certificate of Appealability of Mr. Harding submitted for relief outlined the constitutional claim ignored by the court of appeals under constitutional claim designed by the statute and current precedent. *Murray v. United States,* 145 F. 3d 1249 (11th Cir 1998). Its failure to do so prevented Mr. Harding from the proper redress to vacate the judgment in the district court.

CONCLUSION

The lower court of appeals obtained Mr. Harding's request for Certificate of Appealability which contain,

inter alia, a constitutional claim that his counsel's failure to inform that he had a right to decide whether to testify in his behalf to present his theory of defense deprived him of his sixth amendment right to counsel.

By its decision below, the lower court has chosen to ignore the line of fifth amendment due process clause and of his sixth amendment right to assistance of counsel at a "critical state", which this Court has prohibited in *Rock* and *Brooks*. By its decision below, the lower court of appeals repudiates its own controlling precedent under *United States v. Teague*, 953 F. 2d 1525 (11th Cir. 1998) (*en banc*), and of nearly each and every other circuit in the context numeral IV, *supra*.

Under these circumstances, the overriding importance to exercise this Court's supervisory power in order to insure the uniform application of its precedent and to see the fair and consistent administration of justice. This case does meet the immediate consideration of this Court. Therefore, Mr Harding respectfully seeks that this Honorable Court grant that his Petition for a Writ of Certiorari be issued.

Respectfully submitted,

James Edward Harding
10537-001
P.O. Box 725
Edgefield, SC 29824
Petitioner, *pro se*

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-10931-F

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 11 2002

THOMAS K. KAHN
CLERK

JAMES EDWARD HARDING,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

---

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ R. Lanier Anderson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,)		
	)	
vs.	)	Case Nos. Cr-99-BU-110-E
	)	CV-00-BU-8044-E
JAMES EDWARD HARDING,	)	
	)	**ENTERED**
Defendant/Movant.	)	**May 24 2002**

ORDER

This is before the court on the movant/defendant's application to proceed *in forma pauperis* on appeal and his request for issuance of a certificate of appealability. The court finds that the movant is indigent and, therefore, his motion for leave to appeal *in forma pauperis* is due to be and the same is hereby GRANTED. The application for certificate of appealability, however, raises issues entirely unrelated to those raised in the initial motion to set aside

or vacate the conviction under 28 U.S.C. § 2255. The movant's § 2255 motion raised three claims under Apprendi and one claim relating to ineffective assistance of counsel. The instant application for certificate of appealability deals with purported errors in the application of the Federal Sentencing Guidelines. Because the application for certificate of appealability fails to show a violation of a substantial constitutional right, it is due to be and the same is hereby DENIED.

DATED this 23rd day of May, 2002

/s/
H. DEAN BUTTRAM, JR.
U.S. DISTRICT JUDGE

VOLUME I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CR99-BU-110-E
	)	Birmingham, Alabama
	)	June 14, 1999 @ 3:00p.m.
VS	)	June 15, 1999 @ 9:00p.m.
	)	
JAMES EDWARD HARDING,	)	
	)	
DEFENDANT.	)	

* * * * * * * * *

TRANSCRIPT OF JURY TRIAL HELD
BEFORE THE HONORABLE H. DEAN BUTTRAM, JR
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

FOR THE GOVERNMENT:
FRANK SALTER
Assistant U.S. Attorney
Vance Building
Birmingham, Alabama 35203

FOR THE DEFENDANT JAMES HARDING:
TRACY ROBERTS
Attorney at Law
1721 4th Avenue, North
Bessemer, AL 35020

FOR THE DEFENDANT GREGORY HARDING:

JEFFREY D. BRAMER
Attorney at Law
2205 Morris Avenue
Birmingham, AL 35203

COURT REPORTER:

Karla Johnson, RPR
Hugo Black Courthouse, St. 325
1729 5th Avenue N.
Birmingham, Alabama 35203

that briefly.

THE COURT: You may do that. Do you want to speak to that? I think you previously informed the Court you had no problem with that.

MR. SALTER: No, sir. No problem with the Court instructing the jury - -

THE COURT: I have, obviously, a standard instruction that I have previously stated. It would be, in essence, that a defendant has the right not to testify, may or may not. And if he does not, then it cannot be held against him. Do you have any problem with that?

MR. Salter: No problem with that.

THE COURT: The government has no problem. Do you have any problem with that, Mr. Bramer?

MR. BRAMER: No.

THE COURT: Mr. Roberts?

MR. ROBERTS: No, Your Honor.

THE COURT: Now I think what I understand Mr. Bramer to be saying, though, that he wants to have a colloquy on the record outside the presence of the jury, with all parties present, though, with his client, to some extent, at least to the point that he has informed his client of his constitutional rights with regard to self incrimination and the right to testify or not to. I think that's what - - is that what you're saying?

MR. BRAMER: Yes, sir.

MR. SALTER: No objection to that.

THE COURT: All right.

MR. BRAMER: Gregory Harding, you're in court and I'm your attorney; is that correct?

DEFENDANT GREGORY HARDING: That's right.

MR. BRAMER: Prior to coming to the courthouse, and on several occasions, we've talked about your right to testify; is that correct?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: And we've talked about your right to refuse to testify or not to testify?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: And have I told you that if you testify, you would come up to the witness stand and be under oath like all of the other witnesses?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: And I told you that I would ask you questions and you would give answers?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: And then I told you I would sit down and the government attorney would get up and get to cross examine you?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: All right. And you understand that if

you choose not to the testify, no one in the courtroom can make any mention of your failure to testify; do you understand that?

DEFENDANT GREGORY HARDING: That's correct.

MR. BRAMER: Okay. Now, it's your right. Is it your desire to testify or not testify in this case?

DEFENDANT GREGORY HARDING: Not testify.

MR. BRAMER: Okay. Not to testify. Do you have any questions from me or the Court?

DEFENDANT GREGORY HARDING: No.

MR. BRAMER: Thank you, Judge.

THE COURT: All right. Mr. Roberts, do you have anything for the Court to consider at this time?

MR. ROBERTS: Yes, Your Honor. We would like to, on behalf of Mr. James Harding, make a motion for directed verdict of acquittal as to Count Four against James Edward Harding. The government has failed to prove all of the elements involved in that count knowingly and intentionally possessing marijuana with the intent to distribute.

Your Honor, there was no testimony as to intent to distribute. There was testimony from the inmate as to conduct two weeks prior. But nothing that was specifically connected to this particular marijuana. There's nothing that connected the intent to distribute to this particular

marijuana. What the inmate's testimony was that two weeks prior he had sold

some marijuana. But nothing that would connect the intent to distribute to the marijuana that was in possession on March 28, 1998.

As far as knowingly and intentionally possessing marijuana, there was no testimony that Mr. James Edward Harding had any knowledge what was in the package that was delivered to him, or that was allegedly delivered to him, by Gregory Harding.

In fact, two correctional officers said that they didn't know what was in that package when they saw the package. Based on that, Your Honor, we would ask for directed verdict of acquittal as to Count Four for failure to prove the elements

THE COURT: Mr. Salter?

MR. SALTER: Yes, sir. Your Honor, our response would simply be similar to Mr. Bramer's argument. That is, that we have had testimony from the inmate that, I think Mr. Roberts mentioned two weeks or several weeks, but I think his testimony was one week prior to the arrest, that the defendant made statements to the effect that he was in possession of and/or had something to do with the introduction of drugs into the prison system.

We've got his testimony that to a Ms. French, telling her what the defendant was doing, what the defendant James Harding was doing. And that being dealing with drugs in the

MR. SALTER: We call Lieutenant Ruley briefly.

GOVERNMENT WITNESS, BRIAN RULEY, PREVIOUSLY SWORN

THE CLERK: State your name again for the record.

THE WITNESS: Brian Ruley.

DIRECT EXAMINATION

BY MR. SALTER:

Q. Lieutenant Ruley, let me ask you this. Tell us a little bit about contraband. What are the contraband items in the prison?

A. Contraband items in a prison can range anywhere from weapons, narcotics, alcoholic beverages, you name it.

Q. What would be some of the reasons why marijuana is contraband in prison?

A. The main reason that marijuana would be contraband is on, it's an illegal narcotic. Two, it's a lucrative business. It's kind of a supply and demand. They have limited access to it, so it's much more expensive. It's worth more money than it is out on the street.

Q. Let me show you what has been marked as Government's Exhibit Number 4 and I'll show you an exhibit which purports to be an amount of marijuana. Given your experience in the prison system, can you give me maybe an approximate amount that that marijuana would go for in prison?

MR. ROBERTS: Objection, Your Honor

THE COURT: Let me see counsel.

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(Conference outside the presence and hearing of the jury, on the record as follows:)

THE COURT: Mr. Salter, I thought we had handled this matter with regard to someone testifying to something - - this particular marijuana would be worth a lot of money.

MR. SALTER: I'm sorry, Judge. If we did, I missed it. I thought what you were saying was, that I couldn't elicit expert testimony to talk about this being an amount that would signify an intent - - possession with the intent to distribute. But I thought you did tell me I could go into pricing.

THE COURT: I told you could go into the amount and the weight of it and what it might equal and how many cigarettes it might be, if that witness knows. You need to withdraw that question.

MR. SALTER: Okay. I apologize, Judge. I missed that. I'll withdraw it.

THE COURT: Well, I want you to withdraw the question in the presence of the jury. You asked it in the presence of the jury.

MR. SALTER: Yes, sir. And then I will go into how many cigarettes, like you said.

THE COURT: Well, I mean, if he knows.

MR. SALTER Absolutely.

THE COURT: What I'm saying is, it's already in evidence that there's 26.1 or 26.6 grams, whatever. And, of

course, the jury has examined that exhibit containing the contraband or the marijuana.

I have ruled earlier that I did not feel that you should say something - - get a witness, this witness, or any other witness you talked about - - I think you said a deputy warden from the state prison to come in and testify that this, in my judgment, small amount, is worth more in the prison system and it's worth a lot of money. The statement you were going to use was "worth a lot of money".

MR SALTER: Okay.

THE COURT: And I just felt like under 403, regardless of anything else, that that was more prejudicial to the defendant than it had probative value.

MR. SALTER: All right. I missed that. I'm sorry, Judge.

MR. BRAMER: And the witness has already testified that it's worth more money inside than it would be out and so...

THE COURT: Well, that may be common sense. I will also instruct the jury to disregard that one single response this witness has made so far.

MR. SALTER: Yes, sir.

(Conference concluded.)

(Open Court. Jury Present.)

THE COURT: Ladies and gentlemen, there was a

previous question of this witness and a response concerning the value of a substance inside a prison as opposed to outside the prison. I am instructing you to totally disregard that answer and response and that question. As I understand it, that question is withdrawn.

MR. SALTER: Yes, sir. It is withdrawn.

THE COURT: Wipe that from your minds.

BY MR. SALTER:

Q. Lieutenant, I want you to look at Government's Exhibit Number 4 and I'll ask you the question whether or not you can give an opinion as to how many cigarettes that would make?

MR. BRAMER: Object to the predicate.

MR. ROBERTS: Same objection, Your Honor, lack of foundation.

THE COURT: Overruled.

BY MR. SALTER:

Q. You may answer.

A. It would be a very large number. Once again, I don't have a lot of firsthand knowledge of it but I would guess several.

Q. I'm sorry, several what?

A. I would say it would make several cigarettes, several marijuana cigarettes.

MR. SALTER: That's all we have.

THE COURT: Mr. Roberts?

CROSS EXAMINATION

Q. What were you convicted of at that time?

A. Drugs.

Q. Okay. Doing what with drugs?

A. Selling drugs.

Q. All right. And were you sentenced to the penitentiary or a federal institute on that occasion?

A. Probation.

Q. You were given probation?

A. Yes, sir.

Q. By what court?

A. Birmingham, Jefferson County.

Q. The state court, Jefferson county court. Let me take you to March of 1990 - - I'm sorry. Let me take you to October of 1995. That is the conviction that you talked about first, that you are currently serving?

A. Yes, sir.

Q. So primarily now you have two convictions?

A. Yes, sir.

Q. All right. Now, you're testifying in this case; are you not?

A. Yes, sir.

Q. Let me ask you if there is some agreement you got with the government for your testimony in this case?

A. Yes, sir.

Q. What is that agreement?

A. Just a letter based on my sentencing.

Q. If you will, pull up a little closer to the mike, and rephrase that. What is your understanding of the agreement?

A. Like a letter recommending a time reduction.

Q. Well, let me ask you this. Did you meet the government representatives today for the first time?

A. Yes, sir.

Q. Approximately an hour ago?

A. Yes, sir.

Q. Myself being one of those individuals?

A. Yes, sir.

Q. And did we not tell you that for your truthful testimony, we would write you a letter detailing what did you before this jury?

A. Yes, sir.

Q. All right. Is there anything else about what we said - - I mean, is that the sum and total substance of the agreement that you've got with the government?

A. Yes, sir.

Q. That's it?

A. Yes, sir.

Q. And it was done verbally? It's not in writing.

A. Yes, sir.

Q. Let me ask you if you know the defendant in this case, Mr. James Harding?

A. Yes, sir.

Q. Do you happen to know Gregory Harding?

A. I know James.

Q. Where do you know him from?

A. The streets.

Q. When you say "the streets", what do you mean?

A. Out in the free world and I know him from the penitentiary.

Q. How long have you known him altogether?

A. Approximately seven years.

Q. Okay. Let me take you to the approximate date of the 28th of March, 1998, last year. Do you recall when Mr. James Harding was arrested?

A. Yes, sir.

Q. Okay. As a result of somebody bringing marijuana into the prison?

A. Yes, sir.

Q. Prior to that, are you familiar with any drug activity - - when I say prior, I mean any days before that, are you familiar with any scheme that was going on in the prison to bring in drugs?

MR. BRAMER: Judge, I would object to any scheme or any other evidence that would indicate something else other than what we're trying.

MR. SALTER: And that's all we're eliciting.

THE COURT: Overruled. You may answer.

A. Would you repeat that, please?

Q. (By Mr. Salter) Yes, sir. Just tell us, in your own words, what you know about the defendant being involved in bringing drugs into the prison?

MR. BRAMER: Judge, could I clarify which defendant he's making reference to?

MR. SALTER: I will do it. James Harding.

A. Yes.

Q. (By Mr. Salter) Tell us about it.

THE COURT: James Edward Harding?

MR. SALTER: Yes, sir. James Edward Harding. Go ahead.

A. Yes, sir. He used to sell marijuana on the compound in Talladega.

Q. Tell us about how it worked.

A. Like, for instance, he used to get it in on the weekend from the visit and break it down and sell it like in little small quantities, like this, in a plastic bag, for $10.00

THE COURT: All right. Let me speak to counsel out in the hallway for a moment.

(Conference outside the presence and hearing of the jury, on the record as follows:).

THE COURT: I guess I know where you're going with this, Mr. Salter, but what I want you to do is limit yourself 368

Trust it's truly been a pleasant experience for us all even with the outcome for the defendants. Thank you

MR. BRAMER: Yes, Judge.

MR. ROBERTS: Thank you, Judge.

MR. SALTER: Thank you, Judge.

(Court Adjourned.)

STATE OF ALABAMA)
JEFFERSON COUNTY)

I hereby certify that the foregoing is a true and correct transcript of the record of proceedings in the above-entitled matter.

/s/
Karla S. Johnson
Date: 11-4-97

A TRUE BILL

/s/ Shandra L. Barner

FOREMAN OF THE GRAND JURY

G. DOUGLAS JONES

United States Attorney

/s/

FRANK M. SALTER

Assistant United States Attorney

Mr. James Edward Harding
2001 - 2nd Avenue
Jasper, Alabama 35501

Mr Tracy L. Roberts
Attorney At Law
1721 - 4th Avenue North
Bessmer, Alabama 35020

May 6, 1999

Dear Mr. Roberts, I'm writing this letter in regards to the paper's I received from you concerning the prosecutor offer and all. After reviewing such I can't believe he's still tryin to force a more serious charge on me that he knows quite well don't even exist period.

I know for a fact no one can appear to say that I intented to let them have any thing because my brother didn't even know what was supposely in the package. Thats why too, I want to take the stand and testify, because I gotta tell the truth in order they don't try and mess my brother around. I have been calling but were unable to catch you. However, I'm during those motions we talked about hopefully can forward to you no later than the next four or five days.

I do appreciate your time and effort you provide regarding this matter.

Sincerely,

/s/
James Edward Harding

STATE OF ALABAMA
COUNTY OF JEFFERSON

AFFIDAVIT

GREGORY HARDING, hereby states that the facts in the affidavit is true and correct to the best of his knowledge, information and belief, and states:

1. Your affiant states that I am called to testify in behalf of James Edward Harding in any courtroom proceeding, your affiant will state that during the criminal trial your affiant overheard James Edward Harding explained to his attorney, Tracy Roberts, Esquire, attorney-at-law., that he wished to testify on his own behalf based upon a dispute in the testimony of the government's witness, Darryl Steward.

2. Your affiant would also testify in the event, I am called as a witness that attorney Tracy Roberts did not discuss with the Court that James Edward Harding did in fact decide to testify in his own behalf.

WHEREFORE, your affiant hereby states that the facts set forth herein can be established as true.

/s/
GREGORY HARDING.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 17TH DAY OF JUNE, 2002.

/s/
Notary Public.

MY COMMISSION EXPIRES
AUGUST 31, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10931-F

JAMES EDWARD HARDING,
Applicant.

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR CERTIFICATE OF APPEALABILITY FROM THE DENIAL FOR HIS REQUEST FOR CERTIFICATE OF APPEALABILITY TO THE DISTRICT COURT UNDER DOCKET ENTR CV-00-BU-8044-3

James Edward Harding, applicant, pro se., respectfully request that this Court issue a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2253 (c)(1)(B) and Federal Rule of Appellate Procedure 22(b). In support of his motion, applicant would show as follows:

1. STATEMENT OF THE CASE

Applicant was charged with possession of a Prohibited object containing marijuana in a Federal prison, Possession with Intent to distribute marijuana and conspiracy, in violation of 18 U.S.C. 1791 (a)(2), and 21 U.S.C. § 841 (a)(1) and 846. He was ultimately sentenced

to 100 months imprisonment. He unsuccessfully appealed to the Eleventh Circuit Court of Appeals which affirmed on April 21, 2000. The applicant filed his motion for post-conviction relief under 28 U.S.C. § 2255 on on September 5, 2000. On January 22, 2001, applicant filed for an order to supplement the original motion filed. On December 12, 2001, applicant received an order by the Honorable H. Dean Buttram, United States District Judge denying the applicant's motion to vacate. On March 11, 2001, applicant filed his request for certificate of appealability and request to freely to proceed, in forma pauperis. On May 24, 2001, the district court entered its order denying the request for certificate of appealability. This instant request is timely.

In his substantive issues the applicant argues that the district court denied his application for certificate of appealability contending that the applicant fails to show a violation of a substantial constitutional right.[1] However, to the contrary, the applicant demonstrates by the previous order in which denied the § 2255 application, the district court did not address applicant's constitutional claim that he was deprived of assistance of counsel during his criminal proceeding. This provision allows for collateral attack of the consequences of his sentence.

The applicant bases his challenges, de novo, on the United Stated Supreme Court's proposition in Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S.Ct. 2704 (1987)

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1. "R.E. means Record Excerpts attached to this application for record support

which held that it was improper for counsel to deprive applicant his right to testify and his constitutionally guaranteed right to present a defense, or present the jury instruction on the theory of his defense he sought counsel to present the defense case. Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L. Ed. 2d 368 (1973), and whether "debatable jurists of reason would find that a court could resolve the issues [in a different manner] or, that the questions are adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484, 146 L. Ed. 2d 542, 120 S. Ct. 1565 (2000); Barefoot v. Estelle, 463 U.S. 880, 77 L. Ed. 2d 1090, 104 S. Ct. 209 (1983)

The district court's order denying the applicant's issue when it was aware of the "substantial showing," of the denial of the constitutional claim was never reached. Further, the applicant's argument demonstrated that he was deprived of assistance of counsel when his counnsel failed to argue that his client should not have received a sentence for a "career offender." Based upon "possession" of marijuana only constituted simple possession and the "simple possession," is not a controlled substance offense so s to serve as a predicate for career offender purposes to which "debatable jurists of reason; has decided so. United States v. Neal, 27 F. 3d 90 (4th Cir. 1994). The district court did not reach the challenge based upon the supporting authority on the merits.

B. Statement of Relevant Facts

The relevant facts to the issues raised in this COA application concern the district court's actions in denying the applicant's request based its reasons that he failed to show a violation of a substantial constitutional right. The district court overlooked his initial motion to vacate, and its December 12, 2001 order which demonstrates a claim of being deprived of assistance of counsel.[2] Accordingly, the district court determination were mixed under purported errors in the Federal Sentencing guidelines, not, that his counsel failed to argue the guideline issue during the sentencing to which the applicant's issues are framed. The district court never discussed this issue.

II. REASONS THAT THE COA SHOULD BE GRANTED

A. The Standard for a COA

Until April 24, 1996, a federal prisoner who wished to appeal a district court's denial of a motion for post-conviction relief under 28 U.S.C. § 2255 was simply required to file a notice of appeal. However, in 1996, ADEPA added a new requirement - namely, that a

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2. Applicant contends nunc pro tunc, de novo, that his counsel failed to inform the applicant of his right to decide whether to testify and counsel's failure to request for a jury instruction on the lesser included offense to establish his defense and counsel's failure to argue against the career offender enhancement.

"certificate of appealability" ("COA") be granted before an appeal could be pursued. The standard for granting such a certificate requires a federal prisoner to make a substantial showing that his constitutional rights were violated. 28 U.S.C. § 2255 (c)(3); Fed.R.App.Proc. 22. The COA standard set forth in the amended version of section 2253 (c)(3) merely codifies the old standard for obtaining a certificate of probable cause ("CPC") - the statutory predecessor for a COA in a habeas corpus appeal by a prisoner, as set forth in the decisions of Barefoot v. Estelle, 463 U.S. 880 (1983). See; Slack v. McDaniel, 529 U.S. 473 (2000).

The Barefoot standard only requires that the issues sought to be raised on appeal "be debatable among jurists of reason; that a court could resolve the issues [in a different manner than the district court]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. at 893 n.4 (citations and internal quotations omitted; bracketed language in original). It does not require the prisoner show that he will prevail on the merits. As discussed below, applicant's claim that the district court denied his request for certificate of appealability meets this standard, and, accordingly, the district court erred in denying applicant's motion stating that he fails to show a violation of substantial constitutional right and failing to deal with the substantive issues. Thus, this Court should grant a COA and afford this matter under both the de novo and plenary standard of reviews.

III. STATUTORY LANGUAGE IS THE STARTING POINT FOR INTERPRETING STATUE'S MEANING UNDER COA

Even if presentation of the issues denied by the district court were a prerequisite to this Court's review. Applicant will establish "a denial of a constitutional right and the substantial showing of such right." is required by statue.[3] Here, this appeal presents a difficult question of statutory interpretation, which requires this Court to look not at the language of 28 U.S.C. § 2253 (c) (1) (B), but also at the legislative history and the structure and intent of section 2253 (c) (1) (B) and title 28 generally. The statutory language is the starting point for interpreting the meaning of the statue. Slack v. McDaniel, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S.Ct. 1565 (2000); also see; Barefoot v. Estelle, 463 U.S. 880, 77 L. Ed. 2d 1090, 104 S.Ct. 209 (1983).

In interpreting the language of the statue, however, this Court should not just look at just one word or provision in isolation, but rather look to the statutory scheme for clarification and contextual reference. Smith v. United States, 508 U.S. , 124 L. Ed. 2d 138, 113 S.Ct. 2050 (1993).

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3. Under 28 U.S.C. § 2253 (c)(3). Senator Dole's Senate Bill 735 became enacted into Law, which included "only if the applicant has made a "subtantial showing," of the denial of a constitutional right. S. 735 § 702, by the 104th Congress (1995), It further stated that Congress adopted, Specifically, the certificate should not issue unless the petitioner makes a "substantial showing."

Reviewing the "substantial showing," requirement in Slack v. McDaniel, where the Supreme Court explained that although the requirements were codified in 28 U.S.C. § 2253, the standard in Barefoot was still pertinent to the analysis. The Slack Court held [i]n order to obtain a certificate of appealability under § 2253 a habeas applicant must make a strong showing of a "denial of a constitutional right, "a demonstration that under Barefoot includes showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." See; Slack, 120 S.Ct. At 1693-04.

As discerned the Barefoot analysis parallels this Court to look at the applicant's issues as same. Under Barefoot the Supreme Court detailed its analysis under the standards which also requires the issues on appeal "be debatable among jurists of reason; that a Court could resolve the issue [in a different manner] or, that the questions are adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. at 893 n.4.

A review of the existing case authority as well as the Supreme Court's holding will satisfy the standards of the COA where there is a considerable debate among jurists of reason to the issues raised by the applicant. Applicant also states he has arguable merit and the constitutional issues will allow him to prevail on his claim where there is sufficient reason for this Court's review.

IV. APPLICANT'S CLAIM ESTABLISHES THE CONSTITUTIONAL CLAIM AS REQUIRED BY THE STANDARDS UNDER COA

Although applicant persisted in his claim that his § 2255 demonstrates he ws deprived of assistance of counsel. The district court did not address the issues below. The denial of the applicant's § 2255 motion and request for certificate of appealability undermines this Court's ability to give effect to the constitutional command that no one may be deprived of the assistance of counsel at any stage of his criminal proceedings. Which would be violative of the Sixth Amendment of the United States Constitution which provides that "in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense." U.S. Const. Amend. VI.

The question of the constitutional claim here is an issue which has prompted considerable debate among jurists. The facts presented demonstrates that during trial the applicant discussed with his counsel that he decided to testify at trial which would assist with his defense that the contraband obtained from him was for "simple possession," not for renumeration; however, the record during trial clearly demonstrates that when the matter came before the Court, his co-defendant's attorney addressed the Court indicating his client's understanding as to the decision to testify to which co-defendant's attorney informed the Court that he advised the co-defendant of his right to self-incrimination, his right not to

testify, his right to testify and that he spoke to the co-defendant on several occasions prior to coming to the courthouse to which the co-defendant addressed the Court. It was the co-defendant's choice not to testify.[4] (Applicant's Record Excerpts of trial at pages 291 to 294). The fact demonstrates here the omission of his counsel to address the Court with his decision to take the stand in his own defense where counsel's failure to inform the Court of the applicant's decision to take the stand and testify to his defense that the substance obtained was for personal usage, and not for renumeration with intention to distribute where debatable jurists of reason has decided so. See; DeLuca v. Lord, 858 F. Supp. 1330 (S.D.N.Y. 1994) [counsel's failure to inform defendant that defendant had right to decide whether to testify constituted ineffective assistance of counsel] underscores again the fact that the applicant has satisfies the standard for a COA. Two additional factors support . . . . the grant of the COA on this issue. First, during the close of the trial, the Court requested proposed instructions from the defense table counsel failed to present any lesser included instruction on simple possession of a controlled substance again where debatable jurists of reason would obtain a different result. The record during trial clearly demonstrates that when asked of counsel of the proposed instruction to be submitted to the Court counsel informed the Court he had

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4. Applicant provides his "R.E." means means Record Excerpts of his trial and sentencing as support to the "constitutional claim" contended.

no proposed instructions. See; (Applicant's Record Excerpts of trial at pages 298 to 299). See; United States v. Lucien, 61 F. 3d 366 (5th Cir. 1995) [district court erred in refusing defendant's request for lesser included instruction on simple possession of controlled substance]. Secondly, a criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court. See; Cupp v. Naughten, 414 U.S. 147 n.4 (1973)(Rehnquist, J).

IV. THE RULE IN NEAL, CABELLO AND SPRIGGS DEMONSTRATE THE CONSTITUTIONAL CLAIM WHERE DEBATABLE JURISTS OF REASON WOULD HAVE MADE A DIFFERENT DECISION IN THE OUTCOME OF HIS CASE ON WHETHER COUNSEL SHOULD HAVE OBJECTED TO THE ENHANCED PENALTY.

As noted above, the district court failed to reach the substantive issue. If this Court determines that a COA should issue to determine the Neal, Cabello and Spriggs issues. If this Court chooses not to remand, a COA should issue to determine this issues as well. Debatable jurists of reasons has decided so that this issue deserves encouragement to proceed further and counsel's failure to object to the use of the enhancement in a simple possession case was clear error. United States v. Neal, 27 F. 3d 90 (4th Cir. 1994) where the failure to argue to negate the career offender enhancement could not be deemed as

a tacticle decision chosen by counsel. Spriggs v. Collins, 993 F.2d 95, n.2 (5th Cir. 1993) and that the failure to do so constituted ineffective assistance of counsel. Cabello v. United States, 884 F. Supp. 28 n.12 (N.D. Ind. 1995)

Moreover, during sentencing the record demonstrates that the only argument counsel placed before the court indicated his challenge were only an argument based upon challenging the criminal history category for a prior suspended sentence. See; (Applicant's Record Excerpt of Sentencing on page 6). Further, when the court asked counsel would there be any other objections to the applicant's sentencing matter counsel replied there would be no objections to the calculations prior to imposition of the sentence. (Applicant's Record Excerpts of Sentencing at page 12). Thus, counsel waived the applicant's challenge to the career offender enhancement.

More Specifically, because the applicant was improperly sentenced as a career offender based upon the amount of marijuana seized without any objections by counsel. Cabello v. United States, 884 F. Supp. 298 n.12 (N.D. Ind. 1995). A COA should be granted for this issue as well.

The opinion in Cabello, Neal and Spriggs also satisfies the COA standard. This Court should resolve the issues differently than the district court on the application of the constitutional claim. A COA should issue for these reasons as well.

Therefore, this Court should grant a COA and consider this appeal in both plenary and de novo

standards of review and that full briefing should be granted.

Respectfully submitted,
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